No. 15068.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD MITCHELL,

Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation; CHICAGO NORTHWESTERN RAILROAD CO., a corporation,

Appellees.

APPELLEES' BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

Textbooks

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Statement.

The statement of facts set forth in Appellant's Opening Brief is generally correct. It should be added, however, that at the time Mrs. Bula Mitchell had the transaction regarding the checking of the dog with the baggage clerk, Mr. Mitchell, was near by, being about 15 to 20 feet away [Tr. p. 79]. Also, according to Mrs. Mitchell [Tr. pp. 91-92], her husband came in as she was just beginning her conversation with the clerk. After Barney came in, the clerk asked her to show him the tickets and Mrs. Mitchell opened her purse and let him take what he wished [Tr. p. 91]. The clerk then gave Mrs. Mitchell the valuation slip and said, "Write your husband's name and destination, where you are going." [Tr. p. 91.] She wrote this on the slip and gave it back to him and then again he returned it to her to fill in the amount of valuation [Tr. p. 91]. It is shown beyond dispute that Mrs. Mitchell had the slip completely in her own possession on at least two occasions, with opportunity to read it.

ARGUMENT.

I.

There Was No Genuine Issue as to Any Material Fact.

In Point I of his argument, Appellant refers to certain alleged contradictions between the affidavits filed in support of the Motion for Summary Judgment and the interrogatories and affidavit submitted by the Appellant and also the depositions of Appellant and his wife. There are some discrepancies in this respect. The affidavit of E. R. Foster is to the effect that he saw *Mr.* Mitchell make out the valuation slip in his own handwriting. His recollection was apparently faulty and apparently it was really Mrs. Mitchell who performed this act in the presence of her husband. It is submitted that as a matter of law there is no difference between these two sets of facts and that Mr. Mitchell is just as much bound by the actions of Mrs. Mitchell, performed in his presence and later ratified by him when he handed over the dog for placing on the train, as if he had done the same acts himself. It is true that Mitchell says he did not know exactly what Mrs. Mitchell was doing, but he certainly had every opportunity to find out and is, therefore, in law, bound by her actions just as much as if he knew all about them. In other words, the version of the facts contended for by plaintiff, together with all permissible inferences, is insufficient to raise any actual issues, but on the contrary demands a summary decision against him. The judgment allows for resolution of all factual differences in plaintiff's favor, so that no *genuine issue* of fact remains.

Appellant also refers to much lengthy conversation in which Mr. Mitchell is alleged to have stated to various employees of the Appellee, Chicago and Northwestern Railway Company, that the dog was very valuable, that he

desired to be allowed to look after the dog during the passage and that the employees in question promised that Appellant would be able to do so. This has not been contradicted in any way by the Appellees and, therefore, there is no issue as to these facts.

Appellant refers to the testimony of Mrs. Mitchell with regard to her writing in the number "25" in the valuation slip as constituting an issue of fact. No such issue really exists. She admits actually writing the words and figures in her own handwriting and there is, therefore, no issue of fact as to her doing so [Tr. p. 91]. Appellant argues that her testimony that she did not read the printed portion of the slip and did not understand the significance of her writing the figure "25", makes an issue of fact. This is not an issue of fact, but is merely a question as to what legal significance must be attached to her admitted actions, as a matter of law.

Appellant claims that he was not given an "intelligent choice" as to whether he desired to declare and pay for a higher valuation on the dog. The facts themselves are not in dispute. It is merely a question as to whether the facts, undisputed as they are, fasten knowledge upon the Appellant as a matter of law.

At the conclusion of Point I, Appellant makes an argument which is naive indeed. He says that the defendant misled Mr. Mitchell into believing that his dog would be cared for in the baggage car and that plaintiff would have access to the dog at all times. Appellant says that if this had been true, Mr. Mitchell would have been justified in relying on the $25.00 valuation and not paying any extra-charge therefor, but that if Mr. Mitchell had known the truth and had known that the dog was going to be neglected, then he would have declared and paid for a higher

valuation so as to protect himself in the event something should happen to the dog. In other words, if there wasn't much risk of injury to the dog, Mr. Mitchell was not going to pay anything extra on the theory that the dog was valuable. But, if there was going to be any risk of injury to the dog, then he thinks he should have had the right to declare a higher valuation and get more money. The element of risk may have been an actual factor in Mr. Mitchell's determination of these questions, but it would not seem to have any legitimate bearing on the actual value of the dog.

II.

The Doctrine of Estoppel Is Not Applicable Under the Tariff Provisions.

The doctrine of estoppel cannot properly be invoked to defeat the application of the provisions of a tariff such as the one involved in this case. It is a matter of paramount public policy that after the establishment of tariff provisions both carrier and passenger must be bound thereby. One purpose of establishing tariffs was to eliminate the practice of "rebating". Another was to insure similar treatment for everyone. If under particular circumstances a carrier were to be estopped from setting up the tariff provisions, it is easily seen how those provisions might be circumvented by collusion between the carrier and any particular patron. There are many cases expressing the above general thoughts. However, since this is a case involving the carriage of baggage on a passenger train, it is felt that the case of *Boston & M. R. Co. v. Hooker,* 233 U. S. 97, 58 L. Ed. 868, completely governs the situation. In that case the tariff in question read:

> "For excess value the rate will be one-half of the current excess baggage rate per one hundred pounds

for each $100.00, or fraction thereof, of increased value declared. The minimum charge for excess value will be 15¢

"Baggage liability is limited to personal baggage not to exceed $100.00 in value for a passenger presenting a full ticket and $50.00 in value for a half ticket, unless a greater value is declared and stipulated by the owner and excess charges thereon paid at time of checking the baggage."

This tariff provision is similar in all material respects to the tariff provisions set forth in the Transcript on pages 23 to 31, inclusive.

In the *Hooker* case, the plaintiff passenger was not given any information with respect to her ability to obtain greater protection by paying a higher rate, although her luggage was obviously worth much more than the $100.00 limitation. Mr. Samuel Williston, representing the plaintiff, argued that the tariff provision was in reality an attempt by the carrier to escape liability for its own negligence, contrary to common law and statute. He also contended that since the passenger had no actual knowledge of her ability to obtain greater protection by paying a higher rate, the mere fact that such rates were published in the tariff should not cause them to be binding upon her. After an unusually full consideration of these questions, the court rejected both contentions. In the first place, the court held that the tariff provision was a statement of "rates, fares and charges" required to be published by Section 6 of the Interstate Commerce Act, saying:

"We are, therefore, of the opinion that the requirement published concerning the amount of the liability of the defendant, based upon additional payment where baggage was declared to exceed $100.00 in value, was determinative of the rate to be charged,

and did affect the service to be rendered to the passenger, as it fixed the price to be paid for the service rendered in the particular case, and was, therefore, a regulation within the meaning of the statute."

This of course is a direct and complete answer to the Appellant's contention that misrepresentation by Appellees' agent estops Appellees from claiming the benefit of the tariff. In the *Hooker* case, the passenger had no knowledge of any limitation on the carrier's liability and had no knowledge of her ability to obtain greater protection by paying a higher rate. This is the same claim as is made by the Appellant here when he says that Mrs. Mitchell did not know what she was doing when she signed the valuation slip and that the effect of what she was doing was not explained to her and was also not explained to Mr. Mitchell. It applies also to the Appellant's contention that when he himself told Appellees' agents how valuable the dog was, they did not tell him how he could get greater protection.

With respect to the absolute nature of the tariff provisions and the public policy involved in not allowing passenger or carrier to deviate from them, the court said in the *Hooker* case (quoting from *Kansas City Southern R. Co. v. Carl,* 227 U. S. 652, 57 L. Ed. 688):

> " 'The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. It would open a wide door to

fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate, will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. . . . To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate.' "

The *Hooker* case involved a transaction which occurred before the Cummins Amendment to the Interstate Commerce Act in 1915 and the subsequent amendment to the Cummins Amendment in 1916. However, no substantial change so far as baggage is concerned was brought about by that subsequent legislation. This was specifically decided in *Galveston H. & S. A. R. Co. v. Woodbury,* 254 U. S. 357, 65 L. Ed. 301. Mr. Justice Brandeis, speaking for a unanimous court, said:

". . . The subsequent legislation, the Cummins Amendment, Act of March 4, 1915, chap. 176, 38 Stat. at L. 1196, as amended by the Act of August 9, 1916, chap. 301, 39 Stat. at L. 441, Comp. Stat. Sec. 8592, Fed. Stat. Anno. Supp. 1918, p. 387, has not altered the rule regarding liability for baggage."

Also,

"Since the transportation here in question was subject to the Act to Regulate Commerce, both carrier and passenger were bound by the provisions of the published tariffs. As these limited the recovery for baggage carried to $100, in the absence of a declaration of higher value and the payment of an excess charge, and as no such declaration was made and excess charge paid, that sum only was recoverable."

Some of the later cases involving similar questions are:

Wilkes v. Braniff Airways, 288 P. 2d 377 (Okla., Oct. 4, 1955).

In this case the plaintiff checked her baggage at Oklahoma City for carriage to Memphis. It disappeared en route. Bag and contents were conceded to be worth $918.50. Plaintiff sued for that amount, and defendant defended on the basis of its tariff limiting liability to $100.00 in absence of a declaration of higher value and payment of an additional charge therefore at the time of checking the baggage. Plaintiff admits that she did not pay any such additional charge but says she declared a higher value because she told the defendant's agent when she checked her bag, "I have $800 or $900 worth of clothes in my bags. Be careful with my luggage." She also claimed that she had no actual knowledge of the tariff provisions. The trial court directed a verdict for defendant. *Affirmed.* The court held that the rules for air travel are the same as those governing rail travel; that both carrier and passenger are bound by the tariff provisions which passengers are conclusively presumed to know, and that the carrier is forbidden to deviate from them so as to discriminate in favor of any particular passenger.

The plaintiff also pleaded that the defendant was estopped to plead this limitation of liability in view of the plaintiff's statement of the value of her bag and the defendant's agent's failure thereupon to tell her of the limitation. This contention was referred to but flatly rejected.

See, also:

Hartzberg v. N. Y. C. R. Co., 41 N. Y. S. 2d 345 (1943);

Beaumont v. P. R. Co., 131 N. Y. S. 2d 652, aff'd 127 N. E. 2d 80;

Treadway v. Terminal Railroad Association of St. Louis, 84 S. W. 2d 143 (1935);

Cray v. Pa. Greyhound, 110 A. 2d 892 (Pa. Sup. 1955);

Campbell v. Tri-State Transit Co., 17 So. 2d 327 (1944).

In Point III of his brief, Appellant says the tariff provision should not apply as against a charge that Appellees' agent misled Appellant with respect to how the dog would be cared for on the train and as to its accessibility to the Appellant while on the train. He refers to this as a species of fraud. Also, Appellant complains that since the third cause of action sets forth wilful misconduct or wilful negligence, the tariff provisions again should not be applicable. The answer to these contentions is the paramount public policy in seeing to it that both passenger and carrier abide by the provisions of the published tariffs. Appellant's arguments would have some validity if the question were the avoidance of liability by the carrier, but they have no application to our case, where the question is merely limitation on the *amount* of liability, based on a choice of rates.

As to Appellant's claim that he was given assurance of special treatment for the dog, it should be noted that the Interstate Commerce Act (49 U. S. C. A., Sec. 6(7)), provides:

> "No carrier shall * * * extend to any shipper or person any privileges or facilities in the transportation of persons or property, except such as are specified in such tariffs."

In our case, the Appellant, in his affidavits and in his deposition, keeps reiterating the fact that he told the baggage agent and all other employees of the railroad with whom he came in contact, that "Pudsy" was a trick dog, was the "Wonder Dog of Europe," etc., and also makes much of his inquiries as to whether he would be allowed to attend to "Pudsy" while "Pudsy" was in the baggage car, promises that some railroad employee would be in the baggage car at all times, etc., etc. The tariff provisions do not contain any special provisions for taking care of dogs and make no statement as to an attendant being in the car at all times, and, therefore, the making of any special contract for any such purpose would be forbidden by the Interstate Commerce Act. One of many cases illustrating the point is *C. & A. v. Kirby,* 225 U. S. 155, 56 L. Ed. 1033.

In that case the carrier contracted specially and specifically to transport a car of high grade horses to a junction point in time to be put into a fast train for New York. The carrier failed to make the connection and thereby, due to damage to the horses and failure to get to New York at a certain time, the plaintiff lost several thousand dollars. The fact that this was likely to happen was thoroughly known to the carrier and, therefore, if there could be any special undertaking to be liable for the damage, the carrier would certainly have been bound to respond to the plaintiff. However, the court reversed the lower court judgment for the plaintiff, calling attention to the fact that the tariff provisions did not provide for any expedited service, nor for transportation by any particular train and that a carrier cannot validly make a special contact for a service not published in the tariff and not available to everyone.

III.

The Valuation Slip Constitutes a Bar to Appellant's Recovery as a Matter of Law.

Appellees believe that the tariff provisions govern this case. However, the trial judge disregarded the tariff, and based his decision wholly on the value declaration. Considering the facts in the light most favorable to Appellant's contentions, the only possible conclusion from those facts is that Appellant is estopped to deny the contractual limitation of the value of "Pudsy" to $25.00.

According to Appellant himself, he went to the rest room, carrying the dog's crate and leading the dog, while Mrs. Mitchell went to "get the particulars" as to checking "Pudsy" on the train [Tr. pp. 78, 79]. When he came back to the baggage counter his wife was with the baggage clerk, and Appellant was at the counter about 15 or 20 feet away [Tr. p. 79]. The clerk asked Appellant to hand over the dog. Without asking any questions about the details of the transaction, either of the clerk or his wife, Appellant put the dog in the crate and handed it over [Tr. p. 80].

According to Mrs. Mitchell, she went and talked to the clerk while Appellant went to the rest room [Tr. p. 90]. Close to the beginning of the conversation, "Barney came in * * *" [Tr. p. 91]. After that, at the clerk's request, she let the clerk have their tickets, paid him some money [Tr. pp. 95, 96], and then made out the valuation slip—all this with Barney standing by.

Mrs. Mitchell says she did not read the valuation slip, and Appellant relies on this as constituting an issue of fact. As to this the cases hold, however, that as a matter of law she must be deemed to have read it.

Thus, in 12 Cal. Jur. 2d 262, Contracts, Section 61, it is said:

> "When a party, negligent in not informing himself of the contents of a written contract, signs or accepts the agreement with full opportunity of knowing the true facts, he cannot, in the absence of fraud or misrepresentation, avoid liability on the ground that he was mistaken concerning the terms. He cannot be heard to say that he did not read the contract and does not know its contents. He has a legal duty to read a contract before executing it. The fact that he is illiterate does not change the rule. The care of a prudent man in the transaction of his business demands an examination of an instrument before signing, either by himself or by someone for him in whom he has a right to place confidence. If, then, a person enters into an obligation free from fraud, free from undue influence, and without the existence of relations of confidence and trust, the courts will not relieve him from the effects of executing the instrument without reading it or having it read to him."

Also, in *N. Y. C. & H. R. R. Co. v. Beaham,* 242 U. S. 148, 61 L. Ed. 210, the court said:

> "In the circumstances disclosed, acceptance and use of the ticket sufficed to establish an agreement *prima facie* valid which limited the carrier's liability. Mere failure by the passenger to read matter plainly placed before her could not overcome the presumption of assent. New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 27, 25 L. ed. 531, 533; The Kensington, 183 U. S. 263, 46 L. ed. 190, 22 Sup. Ct. Rep. 102; Fonseca v. Cunard S. S. Co., 153 Mass. 553, 12 L. R. A. 340, 25 Am. St. Rep. 660, 27 N. E. 665." (P. 216.)

Mrs. Mitchell attributes her failure to read the valuation contract to the impatience of the clerk, but admits that she had it completely in her possession first when she wrote in Appellant's name and address, and again when the clerk asked her to fill in the amount. A mere glance on either occasion would have been enough to inform her. No fine print or ambiguous language is involved. On the contrary, it is a boldly printed statement that the baggage "is valued at not exceeding $..... and in case of loss or damage to such property, claim will not be made for a greater amount." And at the bottom appears, "Baggage of excess value will be charged for subject to tariff regulations." [Tr. p. 16.] Appellant himself was present during all significant parts of the transaction. Certainly since he was at the counter while his wife exhibited their tickets, paid the excess baggage fee, and signed the valuation slip, and since he made no protest, no effort to obtain information, and then put the dog in the crate and handed it over to the clerk, he cannot now be heard to say that he did not authorize Mrs. Mitchell to do anything but "get the particulars."

Recent cases in point are:

Normann v. Burnham's Van Service, 73 So. 2d 640;

Beaumont v. P. R. Co., 131 N. Y. S. 2d 652, aff'd 127 N. E. 2d 80, *supra.*

Furthermore, the Appellant's act in handing over the dog constituted a ratification, if any were needed.

In *Hutchinson Co v. Gould,* 180 Cal. 356, the plaintiff sought to foreclose a mechanic's lien against the defendant's property for the price of improvements made under a contract signed on defendant's behalf by one Austin, who theretofore had represented defendant and other owners in the tract in other matters. After Austin signed for defendant the plaintiff spoke to defendant, told him that Austin had signed the contract and the defendant said "OK." Now defendant attempts to say that Austin had no authority to sign the particular contract and that there was no ratification because the defendant didn't know the terms of the contract and cannot be held to a ratification without a showing that he knew what he was ratifying. This contention was held invalid and the court affirmed judgment for the plaintiff. The court said:

> ". . . It is true that the nature and character of the proposed improvements and the price therefor and the extent thereof—essential features of the contract—were not disclosed by the statement and question of Mr. Hutchinson. On the other hand, Mr. Gould knew of his ownership of the lots fronting upon the streets in question; knew Mr. Austin and his familiarity with the contract and with the conditions necessary for successful sales, and his question concerning the contract, 'Did Mr. Austin sign it?' showed that he was willing to trust to the judgment of Mr. Austin in regard to the matters not disclosed by Mr. Hutchinson's question. As is said in 2 Corpus Juris, 481: 'The lack of full knowledge does not protect a principal who is wilfully ignorant, and deliberately chooses to act without such knowledge, as where, knowing that he is ignorant of some of the facts, he has such confidence in his agent that he is

willing to assume the risk and ratify the act without making inquiry for further information than he at the time possesses, or where he intentionally and deliberately ratifies without full knowledge, under circumstances which are sufficient to put a reasonable man upon inquiry.' (See, also, to the same effect, Mechem on Agency, 2d ed., sec. 404; *Ballard v. Nye,* 138 Cal. 588, 598 (72 Pac. 156); *Pope v. Armsby,* 111 Cal. 159 (43 Pac. 589); *Phillips v. Phillips,* 163 Cal. 530, 535 (127 Pac. 346).)" (P. 358.)

See, also:

Schnier v. Percival, 83 Cal. App. 470.

2 Cal. Jur. 2d 747, Agency, Section 86, says:

"*Constructive Knowledge.* Constructive knowledge is ordinarily insufficient to support a ratification. However, the general rule that knowledge is essential to a binding ratification is intended to protect the vigilant, not to aid those who, advised by the situation and surroundings that an inquiry should be made, make none. Hence, if a principal, knowing that he is ignorant of some of the facts relating to an unauthorized act of his agent, deliberately ratifies that act, he assumes the risk and is bound to the same extent as if he had actual knowledge. Similarly, where the circumstances are sufficient to put a reasonably prudent man on inquiry, and the principal nevertheless ratifies his agent's unauthorized act without seeking to discover the true state of affairs, he is bound; for where the situation naturally and reasonably suggests that the principal should make an inquiry, and he fails to do so, he will be deemed in law to be possessed of such facts as the inquiry would have disclosed."

Conclusion.

Appellees believe that this case is completely governed by the tariff provisions under the authority of the *Hooker* and *Woodbury* cases. Nevertheless, however, even if sole reliance were placed on the declaration of value, there also seems to be no genuine issue as to any material fact, but on the contrary the facts taken most favorably toward Appellant's contention still demand the entry of summary judgment against him as a matter of law.

Respectfully submitted,

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